Northeastern's Second Application.

In the meantime, Northeastern proceeded expeditiously in the preparation of its second application and on December 21, 1950, only six weeks after the issuance of the Commission's Opinion No. 202, Northeastern applied for authority to expand its previously authorized facilities so that it could serve the entire area through a single system (R. 673a).[9] In such application Northeastern showed that its proposal would effect savings of more than $20,000,000 in capital investment plus $3,000,000 per year in operating costs over that of Algonquin by the elimination of duplicate and overlapping facilities. Northeastern also showed that its proposal would effect a saving of 50,000 tons of steel for which there was an urgent need in the national defense emergency which had been declared by the President subsequent to the issuance of Opinion No. 202. Northeastern further showed that it could make gas available to 92% of the customers more than a year prior to the time Algonquin could commence service (R. 675a).

Since the Commission had previously indicated that the single pipeline system in New England should have several sources of gas supply, Northeastern, on December 28, 1950, filed a supplement to its intervention in the proceedings on Texas Eastern's application whereby Northeastern sought to obtain from Texas Eastern a portion of the gas supply for its expansion program (R. 6[illegible]a).

On January 9, 1951 Northeastern filed a motion to consolidate its new application with the pending application of Algonquin on which hearings were scheduled to resume on January 15, 1951 (R. 727a). In such motion Northeastern pointed out that such consolidation would not delay disposition of Algonquin's application since Northeastern was prepared to present its case promptly (R. 729a).

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[9] Until the Commission had decided which of the facilities covered by Northeastern's first application would be authorized, the expanded facilities to be covered by Northeastern's second application could not be definitely determined. As Algonquin recognizes in its instant petition (p. 16), such an application ordinarily "requires months of preparation."

The Orders Under Review.

On January 10, 1951 the Commission adopted three (3) of the four (4) orders here under review.

By the first order (R. 61), the Commission dismissed Northeastern's second application to the extent that it sought authority to serve the markets covered by Algonquin's application, such dismissal being "without prejudice to its refiling should the pending application of Algonquin be denied." The order further provided that the portion of Northeastern's new application which sought authority to serve markets not theretofore applied for by either applicant would be set for hearing by further order (R. 66).[10]

By the second order (R. 75) adopted on the same day, January 10, 1951, the Commission recited the fact that it had that day dismissed Northeastern's new application and that accordingly Northeastern no longer is "in competition with Algonquin for natural gas markets" and on the basis of such finding the Commission terminated Northeastern's intervention in the pending hearings on Algonquin's application which, as previously stated, were scheduled to resume on January 15, 1951 (R. 77).

By the third order adopted on January 10, 1951 the Commission dismissed the supplement to Northeastern's intervention in the Texas Eastern case by which Northeastern sought to obtain from Texas Eastern a portion of the gas supply for its expansion program (R. 79-80).

Further hearings were then held on Algonquin's application on January 15, 1951 in which Northeastern, since it was no longer an intervenor, could not participate. Thereafter, on January 23, 1951, the Commission heard oral argument *en banc* upon Algonquin's application (R. 138) and Northeastern, since it was no longer an intervenor, could not participate in this argument.

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[10] These non-competitive markets represented only 6% of the markets covered by Northeastern's second application and Northeastern had advised the Commission that it would be "impractical" to build facilities for such minor deliveries unless it was authorized to serve all of the markets (R. 728a).

On February 27, 1951 the Commission issued its Opinion No. 206 and accompanying order (the fourth order here under review) by which it granted a certificate to Algonquin authorizing it to serve all the markets which had been "reserved" for Algonquin by Opinion No. 202 (R. 134-184). In so doing, the Commission did not make any findings which would negative its prior statements with respect to the greater desirability of a single pipeline system (R. 165-167).

Applications for rehearing having been denied, petitions for review were promptly filed pursuant to Section 19(b) of the Act.[11]

The lower court held that the Commission erred in dismissing Northeastern's second application without a hearing as required by Section 7(c) of the Act (R. 1578-1584). The Court further held that since Northeastern's application was dismissed without prejudice to refiling if Algonquin's application were later denied, Northeastern was entitled, *in any event,* to be heard as an intervenor in opposition to Algonquin's application (R. 1584-1586). The lower court therefore set aside the four (4) orders under review and remanded the cases to the Commission for further proceedings not inconsistent with the court's opinion (R. 1586-1587).

ARGUMENT.

In seeking certiorari, Petitioners contend that the decision below represents an unwarranted extension of *Ashbacker Radio Corporation* v. *F. C. C.,* 326 U. S. 327 and an

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[11] Applications for rehearing with respect to the three (3) orders of January 10, 1951 were filed on January 31, 1951 (R. 771a, 791a, 799a) and were ignored by the Commission when, by Opinion No. 206, it issued a certificate to Algonquin. Thereafter, by Opinion No. 208 and order of March 1, 1951 (R. 185-210), the Commission denied two of the applications for rehearing and the third was denied by lapse of the statutory thirty-day period. The application for rehearing on the fourth order of March 1, 1951 was filed on March 7, 1951 (R. 842a) and was also denied by lapse of time.

While Algonquin, as stated in its petition (p. 11), commenced construction of its facilities, it has done so "at its own risk" and upon the assurance to the court below that such construction will not "moot the ultimate issues in this case or circumvent the judgments of the court" (R. 1624).

undue restriction of *C. A. B.* v. *State Airlines,* 338 U. S. 572 and that such decision denies the Commission administrative flexibility in dealing with competitive applications for certificates of public convenience and necessity.

There is no merit in such contentions, as hereinafter shown. Moreover, the decision below is correct without regard to the questions sought to be raised in the petitions.

(1) The Commission admits (Pet. 11) that Northeastern was "entitled to a hearing" on its second application as *required* by Section 7(c) of the Act, but the Commission argues that the proceedings which were held *prior* to the filing of such application "satisfy the statutory requirement" (Pet. 12), in that the Commission's prior Opinion No. 202 had "divided" the New England markets between Northeastern and Algonquin (Pet. 15). These contentions are erroneous.

As Algonquin recognizes (Pet. 8), the Commission did *not* grant a certificate to Algonquin when it issued its Opinion No. 202. As stated in said opinion, the hearings on Algonquin's application had not been completed and under the limited waiver of intermediate decision procedure the Commission did not then have before it the ten (10) distributing companies which had executed contracts with Algonquin and which were not covered by Northeastern's first application (R. 109). And in its *subsequent* Opinion No. 206 and order of March 1, 1951 the Commission expressly recognized that by said Opinion No. 202 it had issued a certificate, authorizing Northeastern to serve a portion of the area "and *reserving decision* on that part of the application of Algonquin not competitive with that of Northeastern" (R. 167).

While Opinion No. 202 denied Northeastern authority to serve seventeen (17) of the distributing companies covered by its first application, such denial was not on the merits, but was merely for the purpose of assuring the availability of sufficient markets to support "*a project* to serve the balance of the area" (R. 107). Moreover, the opinion did

not state nor imply that "a project" to serve the remainder of the area could be proposed only by Algonquin or that Northeastern would be precluded from thereafter applying for authority to expand its facilities so that the entire New England area would be served by a single pipeline system. This is particularly significant since the Commission was then fully advised, by reason of the "proposal" which Northeastern had previously filed in repsonse to the Commission's prior Opinion No. 201, that Northeastern intended to file a further separate application to serve the balance of New England through a single system (R. 629a).

Moreover, in said Opinion No. 202, the Commission adhered to the view it had previously expressed in its prior Opinion No. 201 that a single pipeline system would *best* serve the public convenience and necessity since it would eliminate the duplicate facilities and unnecessary costs of two systems (R. 87, 106).

As the lower court observed, it was "imperative" under these circumstances that the Commission hear and consider Northeastern's proposal to serve the entire area through a single system before it authorized the "unjust and unnecessary financial burden upon the gas consumers in New England" which, according to the Commission's own statements (R. 87, 89), would result from the approval of Algonquin's application.[12]

In connection with the foregoing, it should also be noted that, contrary to the statement in Algonquin's petition (p. 8), the Commission did *not* conclude that "it would *better* serve the public interest to have two wholesale natural gas systems in New England." And, contrary to the statement in the Commission's petition (pp. 18-19), the Commission did *not* find that the markets in question "could *best* be served by Algonquin."

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[12] As a result of the Commission's action Blackstone Valley Gas Electric Company (Blackstone) and Fall River Gas Works Company (Fall River) have been denied the opportunity to obtain the prompt and better service which they would receive from Northeastern pursuant to the contracts which they executed with Northeastern (R. 965a-968a, 980a) despite their showing that natural gas service would enable them to effect annual savings totalling some $928,560 (R. 951a, 964a).

The decision below thus turns upon the unusual facts of this case and does not involve any extension of *Ashbacker Radio Corporation* v. *F. C. C.*, 326 U. S. 327. It is equally clear that the decision below will have little, if any, significance in the future administration of the Act. This is particularly true since the Commission is now in the process of promulgating a regulation which will prescribe the procedure to be followed on competitive applications in the future.[13]

(2) There is also no merit in the Petitioners' contention that the decision below represents an undue restriction of the holding in the *C. A. B.* v. *State Airlines*, 338 U. S. 572. In that case, the Civil Aeronautics Board, in accordance with its usual practice, held an "area proceeding" in which *all* of the applicants were *fully* heard and the only issue on appeal was whether there had been sufficient notice that the C. A. B. might grant one of the applicants a route which was not specifically referred to in its application.

The Federal Power Commission is authorized by Section 7(f) of the Natural Gas Act to determine the "service area" of a pipeline company and the latter may then enlarge or expand its facilities within such area without further authorization from the Commission. However, the Commission has *never* made such a determination in *any* proceeding. And, as shown by the opinions and orders which are now before the Court, the Commission hears and decides certificate applications upon the basis of the specific communities and distributing companies which the applicants are proposing to serve (R. 87, 104, 122, 174). Moreover,

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[13] On May 1, 1952 the Commission published a supplemental notice of a proposed revision of its rules and regulations governing certificate applications, which will provide, *inter alia*, "that when an application is filed less than fifteen days prior to the commencement of a hearing theretofore ordered on a pending application and seeks authority to serve some or all of the markets sought in such pending application or is otherwise competitive with such pending application, *the Commission will not schedule the new application for hearing until it has rendered its final decision on such pending application*, except when, on its own motion, or on appropriate application, it finds that the public interest requires otherwise" (17 Federal Register 4390).

the Commission has recommended to Congress that Section 7(f) of the Act be amended "*to eliminate the service area provision*" and "to provide for the enlargement of *existing* facilities to serve *present* customers under such rules and conditions as the Commission may prescribe."[14]

In the instant matters, unlike the *State Airlines case*, the Commission did *not* decide "that the policies of the Act could best be served by a consolidated area proceeding" (338 U. S. at 576) and there is thus no basis for Petitioners' contention that the decision below represents an undue restriction of this Court's holding in that case.

(3) Without regard to the questions sought to be raised in the petitions, the decision below is correct since, as the lower court properly held, Northeastern was entitled to be heard, *in any event*, as an intervenor in opposition to Algonquin's application.[15]

The Commission's dismissal of Northeastern's second application was without prejudice to refiling in the event Algonquin's then pending application were later denied (R. 66). Accordingly, a subsequent denial of Algonquin's application would have left the way clear for Northeastern's application to be heard and decided. Northeastern therefore had a direct and vital interest in being heard in opposition to Algonquin's application.

As this Court pointed out in the *State Airlines case* "the prime purpose of allowing interested persons to offer evidence" in certificate proceedings is to give the administrative agency "the advantage of all available information as a basis for its selection of the applicant *best* qualified to serve the public interest" (338 U. S. at 578).

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[14]Thirty-first Annual Report of the Federal Power Commission for 1951 (p. 145).

[15] The Commission's petition ignores this part of the decision below except for the misleading and erroneous statement in a footnote (Pet. 10) that the dismissal of Northeastern's intervention "is without significance." Algonquin's petition (p. 19) contains the factually inaccurate statement that Northeastern as an intervenor "participated *fully*" in Algonquin's case "both before *and after* Algonquin's application was consolidated for hearing with that of Northeastern" and Algonquin then advances (Pet. 26) the inconsistent and erroneous contention that there was no reason to permit Northeastern "*to continue* in Algonquin's case."

It therefore should be noted that the Commission's action in terminating Northeastern's intervention precluded Northeastern from presenting evidence which would have shown that Algonquin's application should not be granted under any circumstances (R. 792a). Moreover, such action precluded Northeastern from participating in the argument which the Commission heard *en banc* upon Algonquin's application.

The net effect of the Commission's action in these matters was to approve the "extensive and needless duplication and overlapping of facilities" and the "unjust and unnecessary financial burden upon the gas consumers in New England" which, according to the Commission's own statements (R. 87, 89), will result from the granting of Algonquin's application. In so doing, the Commission refused even to hear or consider Northeastern's proposal to serve the entire New England area through a single pipeline system which the Commission itself had found would *best* serve the public convenience and necessity.

CONCLUSION.

The decision below is clearly correct and there is no conflict. It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

Respectfully submitted,

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August, 1952

APPENDIX.

The pertinent provisions of the Natural Gas Act of 1938, 52 Stat. 821, as amended, 56 Stat. 83, 15 U. S. C. 717 *et seq.* are as follows:

Sec. 7(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extension thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authoring such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if aplication for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice of hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

Sec. 7(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

Sec. 7(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

Sec. 7(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

Sec. 7(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural gas company.

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Sec. 15(a) Hearings under this act may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such

rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

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Sec. 19(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

Sec. 19(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in

the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended.

Sec. 19(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

FILED
OCT 24 19
HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 70.

ALGONQUIN GAS TRANSMISSION COMPANY and TEXAS EASTERN TRANSMISSION CORPORATION,

Petitioners,

v.

NORTHEASTERN GAS TRANSMISSION COMPANY, TENNESSEE GAS TRANSMISSION COMPANY, FEDERAL POWER COMMISSION, BLACKSTONE VALLEY GAS AND ELECTRIC COMPANY and FALL RIVER GAS WORKS COMPANY,

Respondents.

PETITION OF ALGONQUIN GAS TRANSMISSION COMPANY AND TEXAS EASTERN TRANSMISSION CORPORATION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.